Jurisdictional Statement

81-1953

No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1981

STARVIEW DRIVE IN THEATRE, INC.,

Appellant,

vs.

PEOPLE OF COOK COUNTY, ILLINOIS, GEORGE W. DUNNE, President of the BOARD OF COMMISSIONERS of COOK COUNTY, ILLINOIS, and BOARD OF COMMISSIONERS of COOK COUNTY, ILLINOIS; ex rel. BERNARD CAREY, State's Attorney of COOK COUNTY, ILLINOIS,

Appellee.

Appeal From The First District Appellate Court
Of Illinois

APPELLANT'S JURISDICTIONAL STATEMENT

L. ROBERT ARTOE
Suite 714, Unity Building
127 North Dearborn Street
Chicago, Illinois 60602
312-782-9119
Attorney for Appellant

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COOK COUNTY OUTDOOR MOVIE THEATRE ORDINANCE IS AN UNCONSTITUTIONAL RESTRICTION ON FREEDOM OF EXPRESSION GUARANTEED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

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IN THE

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OCTOBER TERM, 1981

No.

STARVIEW DRIVE IN THEATRE, INC.,

Appellant,

vs.

PEOPLE OF COOK COUNTY, ILLINOIS, GEORGE W. DUNNE, President of the BOARD OF COMMISSIONERS of COOK COUNTY, ILLINOIS, and BOARD OF COMMISSIONERS of COOK COUNTY, ILLINOIS; ex rel. BERNARD CAREY, State's Attorney of COOK COUNTY, ILLINOIS,

Appellee.

Appeal From The First District Appellate Court
Of Illinois

APPELLANT'S JURISDICTIONAL STATEMENT

OPINIONS BELOW

This Appeal seeks review of that part of the decision of the Illinois Appellate Court for the First District[1] which found certain sections of the COOK COUNTY OUTDOOR MOVIE THEATRE ORDINANCE to be

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[1] The caption of this case contains the names of all parties.

constitutional. *People of Cook County, ex rel. Bernard Carey* v. *Starview Drive In Theatre, Inc.*, No. 80-1538 (Appellate Court of Illinois, First District, September 8, 1981) (see attached Appendix C) reported as 100 Ill. App.3d 624, 427 N.E.2d 201 (1981).

A Petition for Rehearing was filed in the Illinois Appellate Court which was denied on September 24, 1981 (see attached Appendix B).

The Supreme Court of Illinois denied on February 2, 1982, the STARVIEW's Petition to Appeal filed October 29, 1981. No. 55725 (see attached Appendix A).

JURISDICTION

The Illinois Supreme Court denied on February 2, 1982, the STARVIEW's Petition to Appeal from certain parts of the Opinion of the Illinois Appellate Court for the First District, rendered on September 8, 1981, holding certain sections of the Cook County Outdoor Movie Theatre Ordinance to be constitutional. No petition for rehearing was filed in the Illinois Supreme Court. A notice of Appeal to the Supreme Court of the United States was filed in the Appellate Court of Illinois on February 26, 1982. This Petition is being filed within ninety days of the date of the decision of the Illinois Supreme Court as per 28 U.S.C. sec. 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(2), and *King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100 (1928).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The FIRST AMENDMENT to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The FOURTEENTH AMENDMENT of the Constitution of the United States provides in part:

> . . . nor shall any State deprive . . . ; nor deny to any person within its jurisdiction the equal protection of the laws.

The COOK COUNTY OUTDOOR MOVIE THEATRE ORDINANCE (Ch. 14-47, et seq.) provides in pertinent part:

> 14.47. That no citizen, firm or corporation of this State shall operate a public outdoor movie theater used for public viewing of motion pictures or other film presentations in the County of Cook, and outside the limits of any city, town, or village, without first having obtained an outdoor movie theater license for each location.
>
> 14.53. That every applicant for a license shall covenant and agree:
>
> • • •
>
> (3) To desist from exhibiting any motion picture or film presentation viewable from any private residence or any public street or walkway which contains any scene or scenes depicting any of the following sexually explicit nudity:
>
> (A) Sexual intercourse, masturbation or oral copulation; or
>
> (B) Touching, caressing or fondling of the bare female breast or bare male or female buttocks, anus, or genitals; or
>
> (C) Erect male genitalia or male ejaculation.

(Full text of Ordinance attached hereto as Appendix E.)

STATEMENT OF THE CASE

The STARVIEW DRIVE-IN THEATRE, INC.[2] (hereinafter referred to as STARVIEW), is an Illinois corporation incorporated on November 3, 1978, in the State of Illinois. The licensee is owned and operated for the purpose of presenting motion pictures or other film presentations for public viewing at an outdoor movie theatre. The theatre is located near Routes 20 and 59 in an unincorporated area of Hanover Township in Cook County, Illinois, approximately 35 miles from the City of Chicago. The STARVIEW's above-described business activities upon which a complaint was based occur within the geographical limits of the County of Cook which is not within the corporate limits of any city, town or village and thus fall within the Ordinance.

Since September 12, 1975, the STARVIEW and its predecessor have been exhibiting motion pictures at its location. At no time during this tenure has any film been exhibited at that location that has been denied First Amendment protection nor has any film presented been the subject matter of any obscenity prosecution known to the Appellant with the exception of the films mentioned herein.

The audience admitted to the theatre has been limited to adults only and the STARVIEW has taken great precautions to see that the films cannot be seen outside the theatre grounds.

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[2] The Starview Drive In Theatre Corp. is an Illinois corporation that has no subsidiary corporations, no affiliate corporations and is not the subsidiary of any other corporation (no parent corporation).

Cook County Board Action

On June 20, 1978, the Finance Committee of the Cook County Board considered and adopted a certain Ordinance (Ch. 14-47, et seq.) which would have the effect of denying to anyone who exhibited motion pictures containing certain scenes a license to operate.

On July 10, 1978, The Board of Commissioners of Cook County, Illinois, passed the Ordinance in question as recommended by the Finance Committee.

The Ordinance referred to requires under Sec. 14-47 that no citizen, firm or corporation of the State of Illinois shall operate a public outdoor movie theatre used for public viewing of motion pictures or other film presentations in the County of Cook, and outside the limits of any city, town or village without having first obtained an Outdoor Movie Theatre License for each location.

The challenged part of the Ordinance at issue required, and still requires, that the licensee expressly covenant and agree to:

> "3. To desist from exhibiting any motion picture or film presentation viewable from any private residence or any public walkway which contains any scene or scenes depicting any of the following sexually explicit nudity:
>
> a. Sexual intercourse, masturbation, or oral copulation; or
>
> b. Touching, caressing or fondling of the bare female breast or bare male or female buttocks, anus or genitals; or
>
> c. Erect male genetalia or male ejaculation."

No mention is made in the Ordinance of Obscenity nor the required tests of Obscenity. The STARVIEW

in applying for licenses has not waived any rights guaranteed to it under the Constitution and laws of the United States of America or the State of Illinois. For this reason the STARVIEW added language to that effect in submitting its application for license on every occasion.

United States District Court

Shortly after the passage of the Ordinance STARVIEW filed in the United States District Court for the Northern District of Illinois a Complaint seeking, among other relief, a Declaratory Judgment that the Ordinance was unconstitutional. Said suit was dismissed by the Hon. Hubert Will on December 23, 1978, under the doctrine of abstension.

Criminal Action And First Case

During the evening hours of July 26, 1978, after the Federal Complaint had been filed and all defendants in that suit served with process, the Sheriff of Cook County, through his agents, raided the STARVIEW, confiscated two 35mm films playing there, as well as other materials, arrested the manager of the theatre and the projectionist, and charged the manager with two counts of obscenity in violation of the Illinois Statute (Ch. 38, *Ill.Rev.Stat*, sec. 11-20) as well as two counts of violating the Ordinance in effect at that time. Said raid was accomplished with the aid of a search warrant authorizing seizure of the two films only.

In a civil suit filed December 1, 1978, entitled *People of Cook County; ex rel. BERNARD CAREY vs. STARVIEW DRIVE-IN THEATRE, INC.*, 78 CH 7723, The Hon. Reginald Holzer of the Chancery Division of the Circuit Court of Cook County heard arguments regarding

the constitutionality *vel non* of the Ordinance as originally passed. Judge Holzer entered a Final Order and Opinion on May 29, 1979, finding the Ordinance in question illegal, unenforceable and unconstitutional. Said order was incorporated in the record in this case in the actions below.

Based upon Judge Holzer's opinion the charges against the STARVIEW manager were dismissed in the aforementioned criminal case as they pertained to the violation of the Ordinance.

Of the two criminal charges one was nolo'd by the State prior to trial and the other was then the subject of a criminal trial the verdict of which was subsequently reversed by the Illinois Appellate Court. (*People* v. *Marsico,* #79-2406, reported as 100 Ill.App.3d 691, 427 N.E.2d 351).

Second Case

On August 6, 1979, the Board of Commissioners of Cook County met and passed certain amendments to the Original Ordinance. A copy of this Ordinance as amended is attached to this Jurisdictional Statement as Appendix E.

On October 23, 1979, a suit was filed by the COUNTY again seeking injunctive relief and a Declaratory Judgment regarding the Ordinance, this time as amended. By order of the Chancery Court an Amended Complaint was filed in December of 1979.

A license was issued to the STARVIEW on January 31, 1980 (license #002), and a brief was filed by the STARVIEW in the Chancery Court on the issue of the unconstitutionality of the Ordinance as amended.

On May 23, 1980, the Hon. Harold A. Siegan, after hearing oral arguments, issued an order wherein he found the Ordinance to be constitutional and distinguished Appellant's cases as this Ordinance does not impose criminal sanctions but only regulates by way of license (see attached Appendix D).

From that Order finding the Ordinance constitutional the STARVIEW appealed to the Illinois Appellate Court for the First District.

After briefs were submitted and oral arguments conducted, the Appellate Court on September 8, 1981, rendered an Opinion affirming in part and reversing in part (see attached Appendix C). From that Opinion STARVIEW filed on September 11, 1981, a Petition for Rehearing which was denied by the Appellate Court on September 24, 1981 (see Appendix B, attached).

From that Opinion STARVIEW petitioned on October 29, 1981, to the Supreme Court of Illinois from that part of the Appellate Court Opinion which affirmed certain sections of the Ordinance as being constitutional.

On February 2, 1982, the Supreme Court of Illinois denied the Petition for Leave to Appeal (see Appendix A, attached). From that denial and from the Opinion of the First District Appellate Court of Illinois STARVIEW now Appeals to the United States Supreme Court from that part of the Opinion holding certain sections of the Ordinance constitutional.

THE QUESTION IS SUBSTANTIAL

THE COOK COUNTY OUTDOOR MOVIE THEATRE ORDINANCE IS AN UNCONSTITUTIONAL INFRINGEMENT ON FREEDOM OF EXPRESSION GUARANTEED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IS REPUGNANT THERETO. THE COURT OF APPEALS' DECISION TO THE CONTRARY STEMS FROM MISREPRESENTATIONS AND MISAPPLICATIONS OF THIS COURT'S DECISIONS.

The Chancery Court, in determining the question of the constitutionality of the Cook County Outdoor Theatre Ordinance, distinguished the cases cited by the STARVIEW in its briefs on the basis that the Ordinance did not impose criminal sanctions but merely regulated the way of license. The STARVIEW argued this point at length in its brief to the Illinois Appellate Court but the COUNTY did not respond to this point nor did the Appellate Court address this issue in its Opinion.

The Appellate Court of Illinois did find certain sections of the Ordinance constitutional under theories which the STARVIEW believes to be in error and repugnant to the Constitution of the United States.

A. Rowan v. Post Office Dept. Misinterpreted.

The Illinois Appellate Court put great emphasis on the case of *Rowan* v. *Post Office Department*, (1970) 397 U.S. 728, for the justification that the ordinance which forbids a licensee from projecting certain scenes into any private residence is constitutional. The STARVIEW

maintains that the Appellate Court has misinterpreted *Rowan*.

On page (C-15) of the Illinois Appellate Court Opinion the Court quotes *dicta* from *Erzoznik* v. *City of Jacksonville*, 422 U.S. 205, 209, to the effect that:

> "Such selective restrictions (censorship) have been upheld only when the speaker intrudes on the privacy of the home. . ." citing *Rowan*, supra," (cited again on page (C-19), ftn. 15 of the Appellate Opinion).

As will be seen from this section of this Appeal, *Rowan* only authorized these "selective restrictions" under circumstances that do not exist under the Ordinance at issue in this case. This will distinguish the instant case from *Rowan* and the cited dicta in *Erzoznik*.

The first point in issue is the quote in ftn. 12 of the Opinion of the Illinois Appellate Court that the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. (page (C-16), ftn. 12, citing *F.C.C.* v. *Pacifica Foundation*, (1978) 438 U.S. 726, 748) The Appellate Court was clearly using a "balancing test" rationale.

The above referred to quote is in direct conflict with the holding of the recent case of *Schad* v. *Borough of Mt. Ephraim*, (1981) ..... U.S. ....., 101 S.Ct. 2176, 41 CCH St.Ct. Bull. B2916. In *Schad* Justice White states:

> "The standard of review is determined by the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." 41 CCH S.Ct. Bull. B2924. ..... U.S. .....

Clearly, it is the right being threatened (STARVIEW's First Amendment rights to exhibit motion pictures) that

should be stressed and not the power being exercised (censorship or Police Power) or the limitation (loss of license for inadvertent viewings by "outsiders") being imposed. See also ftn. 9 of the Illinois Appellate Court's Opinion regarding the relevancy of *F.C.C.* v. *Pacifica Foundation*, supra.

In *Rowan*, supra, the court upheld a federal statute providing that a person may request the Postmaster General to issue an order directing the sender of pandering advertisements which offer for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative, to refrain from further mailings to the named addressee. Such order would also require the sender to delete the addressee's name from further mailing lists.

Aside from the constitutional arguments which will be argued regarding the using of a "balancing test" criteria to a "categorization test" case (see Point C of this Jurisdictional Statement), many major differences exist between the federal statute in *Rowan* and the Ordinance in the instant case.

First, in *Rowan* someone other than a governmental official acting in his official capacity had to first make a subjective judgment that some material sent through the mail to his residence was unwanted. The Cook County Ordinance contains no such requirement.

Second, the homeowner in *Rowan* would inform the Postmaster who in turn would inform the sender to stop and desist from sending material to this named addressee. In the Cook County Ordinance the President of the Cook County Board does not inform the licensee to stop and desist as someone has complained but, rather, immediately

brings an action seeking to revoke the theatre's license to operate and for the first time notifies the licensee of a puported violation.

Third, in *Rowan* the Postmaster merely administers a ministerial function of seeing that this sender no longer sends material to this addressee. In the Cook County Ordinance the President of the Cook County Board seeks an order restricting and prohibiting the theatre owner from exercising any form of speech from this location at any future date.

The Cook County Ordinance is clearly censorship compared to the statute at issue in *Rowan*. In *Rowan* the "unwanted" or "objectionable" nature of the material was left to the subjective judgment of the homeowner resident. In the Cook County Ordinance the President of the Cook County Board acts as "Big Brother" and determines what is, or should be, objectionable. Clearly, this is censorship and is never permitted absent the qualifications as set forth in the STARVIEW's brief in the courts below which concern the communicative impact (categorization) test of First Amendment materials.

The above is particularly important when one considers that there is no scienter requirement present in the challenged ordinance. There is no requirement that the licensee be first informed of any purported violation (or location from which the scene or scenes can purportedly be seen) and this differs materially from the situation in *Rowan*. During the oral arguments of this case in the Illinois Appellate Court the Cook County State's Attorney admitted that a scienter element should be implied. STARVIEW did motion the Illinois Appellate for a copy of that admission but the Appellate Court denied this motion after the Opinion was entered. As

can be seen from the hearing officer's finding attached as an exhibit to the County's brief in the court below and mentioned in the Illinois Appellate Court's Opinion, no scienter element exists in the challenged ordinance. The above makes this Ordinance patently unconstitutional even under *Rowan.*

The *Rowan* case can easily be distinguished from the instant case as the Postmaster's function in *Rowan* was intended as primarily a ministerial one. (*Rowan* v. *Post Office Department,* supra, ftn. 4 on page 735) The statute in question in *Rowan* was specifically amended to eliminate any censorship function from the Post Office. (supra, page 733) The statute also required an administrative hearing and a judicial hearing prior to any compliance order by a District Court. It can be seen that *Rowan* differs from the instant case in that here we have a censorship function as the President of the Cook County Board is invested with certain powers that may lead to a loss of a license to operate and to therefore lose the right to engage in speech of any kind. This would also be contrary to established case law. *Seattle* v. *Bittner,* 505 P.2d 126, 81 Wash.2d 747 (1973).

The power at issue in *Rowan* was obviously the power of the Federal Government to control items sent through the United States Mail. (See: *U.S. Postal Service* v. *Council of Greenburgh,* ..... U.S. .....; 69 L.Ed.2d 517; 101 S.Ct. 2676 (1981).) The amendment specifically was intended to remove "the right of the government to involve itself in any determination of the content and nature of objectionable materials." (*Rowan,* supra, at 733, citing *113 Cong. Rec. 28660* (1967).) The only determination left for the Postmaster was whether or not the mailer had removed the addressee's name from a mailing list.

This is clearly not the case in the instant action as the power sought is obviously censorship in its rawest form. The licensee theatre is not using any medium which is under the power and control of any governmental agency such as the mails (*U.S. Postal Service* v. *Greenburgh*, supra) or the public airwaves (see ftn. 9 of the Illinois Appellate Court's Opinion) but is merely intending to exhibit motion pictures to a paying audience. The ordinance is clearly attempting to censor by designating certain objectionable "scene" or "scenes" and giving power to the Board of Commissioners to revoke the license of the theatre owner if such "scene" or "scenes" are shown and can be seen from enumerated locations irrespective of whether these locations are known to the licensee.

Clearly, the rationale of upholding the federal statute in *Rowan*, supra, fails here as the function of the County Board is not ministerial but is involved in a censorship function which even *Rowan* condemns. This fact was overlooked by the Illinois Appellate Court in its Opinion.

The Due Process argument (Fifth Amendment of United States Constitution) also enters here. In *Rowan* it was said that, "since the sender risks no immediate sanction by failing to comply with the order to remove it cannot be said that this aspect of the procedure denies due process."

This holding is clearly at odds with the procedures in the instant case. In this matter the Cook County Ordinance puts the licensee in a position to be "at risk" of immediate sanction and loss of license for occurrences of which he has not been advised and has no knowledge. This is so as the County is not required to notify the licensee of any location from which the subject material

can purportedly be seen. (See Opinion of the hearing officer attached to the County's brief in the Appellate Court.) This constitutional infirmity leads to a finding of unconstitutionality of this Ordinance and distinguishes this case from the holding in *Rowan, supra,* and the dicta from *Erzoznik,* supra.

B. Conflict with Schad v. Borough of Mt. Ephraim, and other cases from state courts.

A recent opinion of the United States Supreme Court decided subsequent to oral arguments in the case below but prior to the Illinois Appellate Court Opinion adds strength to the STARVIEW's position throughout this action. This is the case of *Schad* v. *Borough of Mt. Ephraim,* ..... U.S. ....., 101 S.Ct. 2176, 41 CCH S.Ct. Bull. B2916 (cited in ftn. 8 of the Illinois Appellate Court Opinion but only as to an explanation of Fourth Amendment interests). Although this is a zoning case its findings are very important and relevant to the instant case.

In *Schad,* supra, the United States Supreme Court held that an entertainment program may not be prohibited solely because it displays a nude human figure, and that nude dancing is not without its First Amendment protection from official regulation.

Schad, supra, was a case on the question of an attempt to regulate by some means other than obscenity, the objectionable quality of speech.

In the instant case the State's Attorney has admitted that what the Ordinance in issue is attempting to accomplish is to regulate something that falls short of obscenity. (ftn. 13 of the Illinois Appellate Court Opinion) The Illinois Appellate Court has recognized this. (C-17)

All cases considered to date have rejected this "something short of obscenity" theory and have reversed findings based upon theories of nuisance, police power, zoning, etc.

In *Schad*, supra, the appellant was contesting a fine imposed by the Borough. At issue was their First Amendment rights to free expression.

The Supreme Court of the United States speaking through Justice White stated that:

> "Entertainment as well as political and ideological speech is protected; motion pictures . . . fall within the First Amendment guarantee." (*Schad*, supra, page B2921 of the CCH Reporter)

Justice White answers the Police Power argument that has been advanced by the COUNTY in the courts below by stating:

> "The standard of review is determined by the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." Citing *Thomas* v. *Collins*, 323 U.S. 516 (529-530) (1945).

The above quotation will also negate any reliance on *Rowan* v. *Post Office*, supra, as has been discussed.

Here, as in the instant case, there was at issue the freedom to communicate non-obscene material that is otherwise protected by the First and Fourteenth Amendments to the United States Constitution.

Justice Blackmun, in his concurring opinion, went further and stated:

> "I would emphasize that the presumption of validity that traditionally attends a local government's exer-

> cise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." (*Schad*, supra, at B2933)

The STARVIEW would like this Court to compare Justice Blackmun's comment above with that of the Illinois Appellate Court on (C-15) of the Illinois Appellate Court Opinion that:

> "We do not believe that the usual heavy presumption of invalidity with which prior restraints are burdened is entitled to much weight in reviewing this ordinance." (C-15, par. 2, of the Illinois Appellate Court Opinion)

In light of *Schad*, supra, the Illinois Appellate Court clearly was in error in this holding.

The STARVIEW asserts that from the reading of *Schad* there can be no debate regarding a theory of "Police Power" as given by COOK COUNTY as their basis for upholding the validity of the Ordinance. This clearly has no significance. Police Powers are merely powers to uphold the "health, safety and morals of the community." *Bilbar Construction Co.* v. *Board of Adjustment*, 393 Pa. 62, 141 A.2d 851 (1958); *Griswold* v. *Conn.*, 381 U.S. 479 (1965); *Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924). When in conflict with the First Amendment interests these will, as in the words of Justice Blackmun: ". . . have little, if any, weight."

Justice Blackmun's summary in *Schad* stated that:

> ". . . in attempting to accommodate a locality's concern to protect the character of its community life, the Court must remain attentive to the guarantees of the First Amendment, and in particular to the protection they afford to minorities against the

'standardization of ideas . . . by . . . dominant political or community groups.'" Citing *Terminiello* v. *Chicago*, 337 U.S. 1, 4-5 (1949).

The Illinois Appellate Court also made much of the COUNTY's argument regarding a lack of remedy if this Ordinance fails. This Appellate Court was overly results-oriented and not concerned with the constitutional effects on the rights of theatre owners as have been stressed by a myriad of United States Supreme Court cases. The Illinois Appellate Court was in error as to this point and certainly in light of the rights of the STARVIEW and not as to the power of the censor.

The Illinois Appellate Court Opinion in the instant case also is at odds with the cases of *People ex rel. Carey* v. *Route 53 Drive-In*, 45 Ill.App.3d 81, 358 N.E.2d 1298 (1976), and *Olympic Drive-In* v. *City of Pagedale*, 441 S.W.2d 5 (Sup. Ct. Mo.) (1969).

In the *Route 53* case, supra, COOK COUNTY attempted to enjoin a drive-in from showing scenes substantially identical to those enumerated in the subject ordinance of the instant case.

The Illinois Appellate Court reversed the entry of a preliminary injunction which enjoined the theatre from exhibiting motion pictures containing those enumerated scenes in such a manner as to be viewable from nearby residences and public highways.

In so doing, the Illinois Appellate Court in *Route 53* concluded that, "the focus of attack was (is) obscenity and the question arose (arises) as to the method of attack." (45 Ill.App.3d 81, at 84).

This is the position of the STARVIEW in the instant case. If this theatre is to be restricted in its exhibitions

under the obscenity exception to the absolute First Amendment protection, certain tests and elements must be met. As these elements are not included in the subject Ordinance and cannot be inferred therein, this Ordinance is clearly an unconstitutional restraint on free expression and fails under either the "public nuisance" rationale of *Carey* v. *Route 53*, supra, or the "legislative enactment" rationale of *Schad*, supra.

In the *Olympic Drive-In* case, supra, the Missouri Supreme Court also found that the use of a premises for a drive-in theatre for a period of four years in a lawful manner with respect to location of the screen and the amount of fencing around the premises was a vested right of which the city could not arbitrarily deprive the theatre owner.

In the instant case it is clear that the STARVIEW was lawfully operating at this location before even the First restrictive Ordinance was passed.

This "vested right" therefore cannot be taken from the theatre owner without strict conformance to constitutional guidelines. Such guidelines are not present in the instant Ordinance.

Of great significance is the quote from *Boyd* v. *U.S.*, 116 U.S. 616, at 635, cited in the brief for the STARVIEW in the Illinois Appellate Court:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

• • •

> "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd* v. *U.S.*, 116 U.S. 616, at 635.

In this case we have what at first impression may be an obnoxious thing. However, if the reasoning of the Illinois Appellate Court were to be left undisturbed the logical extension of this reasoning would be to permit restrictions on any and all forms of speech whether political, commercial or other, if such messages were found to be objectionable in their content by the Cook County Board. Such must never be allowed to occur absent certain restrictions now recognized by the United States Supreme Court and cited by the STARVIEW in its briefs in the courts below and again cited in this Petition under the "categorization" test.

From the above it can be seen that the constitutional principles that have evolved through many years of court decisions must still be adhered to.

C. Admitted Restraint of Free Expression is repugnant to the United States Constitution under the "communicative impact" (categorization) test.

On page (C-8) of the Opinion of the Appellate Court of Illinois, the Court states:

> "Thus, the initial constitutional question raised by this Ordinance is whether the County may use a film's contents as the basis for imposing regulations that fall short of complete Suppression."

The Court then put great significance on the case of *Young* v. *American Mini Theatres, Inc.*, (1976) 427 U.S. 50, to support its position. The Illinois Appellate Court stated on page (C-11) of its Opinion that *Young*, supra,

rejected the STARVIEW's conclusion that, "as the films depicting scenes of sexually explicit nudity do not fall within any of the classifications of speech that may be prohibited entirely (e.g., obscenity), such films may not be regulated either." (page C-11, of the Illinois Appellate Court Opinion)

First, as to *Young*: As is discussed by the United States Supreme Court speaking through Justice White in *Schad* v. *Mt. Ephraim*, (1981) 41 CCH S.Ct. Bull. at p. 2927, in reviewing *Young*, supra, it is stated that the challenged restriction in *Young* on the location of adult movie theatres imposed a minimal burden on protected speech. (citing *Young*, 427 U.S. at 62) The restriction did not effect the number of adult movie houses that could operate in a city; it merely dispersed them.

Such is not the issue in the instant case as the purpose of this Ordinance is to prohibit Drive-In Theatres from exhibiting movies that contain certain enumerated scenes.

It is also to be noted that the *Young* decision has been criticized in legal journals as being inconsistent with other cases (see: 94 Harvard Law Review I, 26-31) and that only three other justices approved the classification of regulating "sexually explicit" material on a basis different from that of "political material." (Id. at 73, Power, J., concurring.)

The Appellate Court of Illinois did ultimately come to a valid conclusion that the deterrent of the Ordinance does result in a restraint on free expression (C-15, par. 2). In discussing whether this legislative "prior restraint" is constitutional, the Illinois Appellate Court again erred.

On page (C-14), the Court stated:

> "The principal vice of this form of prior restraint is that in a contempt hearing, a person may lose the right to assert the defense that his communication was protected by the First Amendment, citing *Vance* v. *Universal Amusement Co., Inc.*, (1980) 445 U.S. 308. That possibility does not exist here. In any proceeding to revoke a license or to enjoin a theatre from operating without one, the theatre owner may raise the defense that the ordinance is void on its face because it is unconstitutionally overbroad or impermissible vague or both." Citing *Shuttlesworth* v. *City of Birmingham*, (1969) 394 U.S. 147.

That is exactly what the STARVIEW is attempting to do in this action. It would seem that what the Illinois Appellate Court has said is that the "prior restraint" is not unconstitutional as the licensee can at some future time raise the issue of constitutionality again. In the opinion of the STARVIEW this argument begs the question and should not be the basis of the opinion. As can be seen the Illinois Appellate Court has committed error by relying on this logic to avoid the constitutional issue.

In determining the constitutionality of a statute on First Amendment grounds one must start with an analysis of the purpose of the challenged statute. If the statute is designed to prevent a harm that arises from the message conveyed by the regulated activity, then a "categorization" test is used. Under this test the communicative activity is absolutely protected unless it falls within certain narrowly defined categories. *Near* v. *Minn.*, 283 U.S. 697 (incitement to immediate violence), *Miller* v. *California*, 413 U.S. 15 (obscenity), *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (fighting words), *Beauharnais*

v. *Illinois*, 343 U.S. 250 (libel). These categories were explained and the cases cited in the courts below in the briefs of the STARVIEW.

If, on the other hand, the challenged statute is directed at a harm that would arise even if the regulated activity had no "communicative impact", then a balancing test is proper.

The courts below misconstrued the purpose of the Cook County Ordinance and have applied "balancing test" reasoning to a "categorization test" case. (See: 95 Harvard Law Review I, 235-241.)

In *U.S.* v. *O'Brien*, 391 U.S. 367 (1968), it was said that a narrowly drawn regulation is sufficiently justified by a substantial interest "if the governmental interest is unrelated to the suppression of free expression." (Id. at 377). If the interest alleged is related to the suppression of free expression, then the categorization test is appropriate.

Clearly at issue in the instant case is an Ordinance whose aim and purpose is the regulation of certain "communicative impact" messages (scene or scenes containing, etc.). As such, this is a "categorization" case and a balancing test cannot be used. The courts below erred on this point. As the courts used a balancing test to uphold an Ordinance that is otherwise repugnant to the Constitution of the United States the holding below must be reversed.

D. "Erotic" scenes not enough to restrict freedom of expression.

On page (C-19 to C-20) of the Illinois Appellate Court's Opinion the Court correctly quotes the *Erzoznik* court

(*Erzoznik* v. *City of Jacksonville*, 422 U.S. at 216, ftn. 15) and the STARVIEW's Brief below to the effect that, "the only narrowing construction which occurs to us (the United States Supreme Court) would be to limit the ordinance to movies that are obscene as to minors." The *Erzoznik* court found the Jacksonville ordinance not susceptible of such a limiting construction and held the ordinance unconstitutional.

The Illinois Appellate Court for the First District in the proceeding below, however, stated that it found no difficulty in holding that scenes such as (clause A and clause C of the subject Ordinance) are erotic and can be prohibited. (C-20 of the Illinois Appellate Court Opinion.)

The Illinois Appellate Court has erred in finding anything "erotic" to seemingly be "obscene in respect to minors." Such is plainly not the case. Eroticism is only one element of obscenity (presumably the "prurient interest" or "A" element of *Miller* v. *California*, 413 U.S. 15, and *Peo.* v. *Ridens*, 59 Ill.2d 363, 321 N.E.2d 264) and does not constitute the sole basis for a finding of "obscene as to minors."

The Illinois Appellate Court erred in using the cited reasoning. It is obvious that if something does not fall within a certain category without a certain element, it does not necessarily follow that if that element is present it falls within the subject category without any regard for the other necessary elements involved.

The line of reasoning that the Illinois Appellate Court has adopted is analogous to the syllogistic fallacy that: All battleships are grey; this is grey; therefore this is a battleship.

In its Opinion the Illinois Appellate Court has based its opinion on the reasoning that: All materials that are obscene (or obscene as to minors) contain material that is erotic; the movies mentioned in the ordinance contain material that is erotic; therefore those mentioned movies are obscene and can be regulated in their exhibition. The falseness and inconsistency of this reasoning should be readily seen and the Illinois Appellate Court should be reversed as to this point.

As mentioned in the STARVIEW's brief below, according to the Illinois statutes (*Ch. 38 Ill.Rev.Stat. sec. 11-20*), to be "obscene" (or "obscene as to minors") a certain tri-parte test must be met. The elements of the test are further defined in the requisite statute. The Illinois Appellate Court below has also recognized this.

Nowhere in the requisite statute or in case law does it say that erotic expression, standing alone, is grounds for a finding of "obscenity" (or "obscenity as to minors"). As the court below said in footnote, even calling these scenes by the title of "Sexually Explicit Nudity" will not cure this defect. (See ftn. 16 of the Illinois Appellate Court's Opinion regarding "calling a thing by a name does not make it so.")

The only conclusion that can be inferred from *Erzoznik*, supra, is that "sexually explicit nudity" equals, or is the same as, "obscene as to minors". This being the case the totality of the elements of obscenity (as to minors) contained in the Illinois Obscenity Statute (*Ch. 38 Ill. Rev.Stat. sec. 11-20(c)*) found to be constitutional in *Ward* v. *Illinois*, 431 U.S. 767 (1978), are necessary before the rights of the appellant may be restricted. As these elements are not present in the subject Ordinance

and cannot be inferred therein, it is unquestionably unconstitutional and the Illinois Appellate Court Opinion must be reversed as to this major point. The STAR-VIEW so prays.

CONCLUSION

The first principle of First Amendment Law is that "the complex web of freedoms which make up free speech" requires that "the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment . . .". *Speiser* v. *Randall*, 357 U.S. 513 (1958).

More precisely, "the line between speech unconditionally guaranteed and speech which may . . . be regulated, suppressed or punished is finely drawn"—and, accordingly, the "separation of legitimate from illegitimate speech calls for . . . sensitive tools . . .". *Speiser* v. *Randall*, supra, *Thomas* v. *Collins*, 323 U.S. 516.

From the above and foregoing reasons stated in this Jurisdictional Statement, the use of a "balancing test" analysis must not be allowed to be used to restrict communicative impact ("categorization test") material.

Only this Court can determine if a new restriction is to be allowed or a new category of exemption from First Amendment protection is to be created.

This Court should speak.

Respectfully submitted,

L. Robert Artoe
Suite 714, Unity Building
127 North Dearborn Street
Chicago, Illinois 60602
312-782-9119
Attorney for Appellant

Dated: March 31, 1982.

Appendix

"APPENDIX A"

55725

ILLINOIS SUPREME COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

Robert H. Gillespy
Clerk

February 2, 1982

Mr. L. Robert Artoe
Attorney at Law
127 N. Dearborn St.
Unity Bldg., S#714
Chicago, IL 60602

No. 55725 - People of Cook County, Illinois ex rel. Benard Carey, State's Attorney of Cook County, Illinois, et al., etc., respondents, vs. Starview Drive-In Theatre, Inc., petitioner. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Robert H Gillespy

Clerk of the Supreme Court

"APPENDIX B"

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF COOK COUNTY, ILLINOIS, GEORGE W. DUNNE, President Board of Commissioners of Cook County, Illinois, and the Board of Commissioners of Cook County, Illinois, ex rel. BERNARD CAREY, State's Attorney of Cook County, Illinois,	)	
Plaintiff-Appellee,	)	
v.	)	No. 80-1538
STARVIEW DRIVE-IN THEATRE, INC.,	)	
Defendant-Appellant.	)	

ORDER

Petition for rehearing denied.

Justice

Justice

Justice

Dated: September 24, 1981

"APPENDIX C"

Second Division
September 8, 1981

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

80-1538

PEOPLE OF COOK COUNTY, ILLINOIS ex rel. BERNARD CAREY, State's Attorney of Cook County, Illinois, GEORGE W. DUNNE, President of Board of Commissioners of Cook County, Illinois, and BOARD OF COMMISSIONERS OF COOK COUNTY, ILLINOIS,

Plaintiffs-Appellees,

v.

STARVIEW DRIVE-IN THEATRE, INC.,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable Harold A. Siegan, Judge Presiding.

Mr. JUSTICE PERLIN delivered the opinion of the court:

This appeal challenges the facial validity of certain provisions of the Cook County Outdoor Movie Theater Ordinance (Cook County Ordinances (1978) chs. 14-47 *et seq.*, as amended), which requires the licensing of all outdoor movie theaters in unincorporated Cook County.[1]

[1] The original outdoor movie theater ordinance 78-0-25 (Cook County Ordinances (1978) chs. 14-47 *et seq.*) was adopted and went into effect on July 10, 1978. On May 29, 1979, the Honorable Reginald J. Holzer held the ordinance unconstitutional. The ordinance was thereafter

Under section 14-53.(3) of the ordinance (Cook County Ordinances (1979) sec. 14-53.(3)), "every applicant for a license shall covenant and agree * * *:

> "To desist from exhibiting any motion picture or film presentation viewable from any private residence or any public street or walkway which contains any scene or scenes depicting any of the following sexually explicit nudity:
>
> (A) Sexual intercourse, masturbation or oral copulation;
>
> (B) Touching, caressing or fondling of the bare female breast or bare male or female buttocks, anus, or genitals;
>
> (C) Erect male genitalia or male ejaculation."

The State's Attorney of Cook County filed an action in the circuit court seeking a declaratory judgment (Ill. Rev. Stat. 1979, ch. 110, par. 57.1) that the ordinance is constitutional and an injunction barring defendant, Starview Drive-In Theatre, Inc. (Starview), from operating without a license.[2] Subsequent to the filing of the complaint, Starview applied for and received a license to operate as an outdoor theater, thereby rendering moot the State's Attorney's prayer for injunctive relief. The issues relating to the constitutionality of the ordinance were briefed and argued by the parties. On May 23, 1980, the trial court ruled that the ordinance is constitutional, from which judgment Starview appeals.

For the reasons hereinafter stated, we hold that clauses (A) and (C) of section 14-53.(3) of the Cook County Outdoor Movie Theater Ordinance are constitutional. We

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[1] (Continued)

amended (79-O-27) on September 4, 1979, in an effort to overcome the constitutional infirmities found in the original. This appeal is concerned with the ordinance in its amended form.

[2] The theater is located at the intersection of Illinois Routes 20 and 59 in unincorporated Cook County.

hold further that clause (B) is constitutional insofar as it applies to the exhibition of films that are viewable from "any private residence"; clause (B) is unconstitutional to the extent it restricts the exhibition of films that are viewable only from "any public street or walkway."[3]

---

[3] In this appeal Starview also challenges sections 14-53.(4), 14-54 and 14-49. We express no opinion on the constitutionality of any of these provisions.

Section 14-53.(4) requires a licensee "[t]o refuse admittance of all minors un-accompanied by their parents or guardians to motion pictures or film presentations as described in paragraph (3) above." We find that Starview lacks standing to contest the validity of this provision. Starview represented to the trial court that "[t]he audience admitted to the theater has been limited to adults only, * * * *" The theater has manifested no intention or desire to change this policy. Thus, Starview has not sustained and is in no danger of sustaining a direct injury as a result of the enforcement of this provision of the ordinance. (*Illinois Gamefowl Breeders Association* v. *Block* (1979), 75 Ill. 2d 443, 451, 389 N.E.2d 529.) Since Starview is not aggrieved by the operation of section 14-53. (4) it cannot question its validity here. (*Walker* v. *State Board of Elections* (1977), 65 Ill. 2d 543, 550, 359 N.E.2d 113.) This is true even though the usual strict rules concerning standing are relaxed when, as in the instant case, a first amendment attack on an ordinance for vagueness or overbreadth is made. (*Grayned* v. *City of Rockford* (1972), 408 U.S. 104, 114.) Starview must still claim "injury in fact" (*Bigelow* v. *Virginia* (1975), 421 U.S. 809, 817) or show "specific present objective harm or a threat of specific future harm" (*Laird* v. *Tatum* (1972), 408 U.S. 1, 13-14). No such injury or harm has been alleged or proved. We therefore decline to consider the constitutionality of section 14-53. (4).

Section 14-54 sets forth the procedure by which a license may be revoked or a licensee fined. Subsequent to the trial court's ruling in the case now before us, the County sought to revoke Starview's license. An extensive hearing was conducted on September 25 and 26, 1980. On January 28, 1981, the hearing officer found that Starview had violated section 14-53. (3) and imposed a fine of $2,500.

Before addressing the merits of the parties' contentions, we must dispose of certain motions which were taken with the case. Starview has moved to strike Appendix A and Appendix B of the State's Attorney's brief.

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[3] (Continued)
We may take judicial notice of this decision (which has been reproduced in Appendix A of the State's Attorney's brief) under the principles laid down in *May Department Stores* v. *Teamsters Local 743* (1976), 64 Ill. 2d 153, 159, 355 N.E.2d 7, and *Nordine* v. *Illinois Power Co.* (1965), 32 Ill. 2d 421, 428, 206 N.E.2d 709. On April 23, 1981, Starview advised this court that it proposed to file in the circuit court a complaint for administrative review of the hearing officer's decision. Presumably, that review is now pending before the circuit court. The issues concerning the constitutionality of section 14-54 will undoubtedly be more fully developed and argued in that proceeding than they have been here (Starview's discussion is extremely brief; the State's Attorney does not even mention section 14-54). Accordingly, we believe appellate consideration of section 14-54 should be deferred until the administrative review action reaches this court. See *Rasky* v. *Anderson* (1st Dist. 1978), 62 Ill. App. 3d 633, 636-37, 379 N.E.2d 1.

Section 14-49 provides, in part, that every license "shall be subject to all laws, resolutions and regulations now in force and effect, or which may hereinafter be enacted, adopted or approved relating to outdoor movie theaters used for public viewing of motion pictures or other film presentations." Starview asserts that by this section, "the County Board is attempting to have the appellant waive his constitutionally protected rights under the First and Fourteenth Amendments." Aside from the provisions of the ordinance already mentioned, Starview does not argue that the County Board has passed any invalid "laws, resolutions [or] regulations" affecting outdoor movie theaters. Whether the County Board will do so in the future is sheer speculation. "* * * [A] declaratory judgment is an inappropriate action for declaring the rights of the parties on a state of facts which has not yet arisen or which is future, contingent and uncertain. [Citation.]" *Baugher* v. *Walker* (4th Dist. 1977), 47 Ill. App. 3d 573, 577-78, 362 N.E.2d 410.

Appendix A (see footnote 3, below) consists of the decision of the hearing officer who presided at the license revocation proceedings brought against Starview for violation of the ordinance provision here in question. Starview asserts that the decision is not relevant or material to any issue in this appeal. We disagree. The decision is germane because it reveals that the theater is exhibiting films containing scenes of "sexually explicit nudity," as that term is defined in the ordinance, and proves that such films are viewable from private residences and public highways. We may take judicial notice of an administrative decision even though it is subject to further administrative and judicial review. (*Rasky* v. *Anderson* (1st Dist. 1978), 62 Ill. App. 3d 633, 636-37, 379 N.E.2d 1; *United States* v. *An Undetermined Quantity, Etc.* (7th Cir. 1978), 538 F.2d 942, 946, n.3.) Starview's motion to strike Appendix A from the State's Attorney's brief is denied.

Appendix B is an affidavit of Robert Napora, a Cook County Sheriff's Police investigator. The affidavit, which was attached to a memorandum of law which the State's Attorney filed with the trial court on February 11, 1980, reports Napora's detailed observations of two films presented at the Starview theater on July 21, 1978. The films included scenes of sexually explicit nudity and were viewable "from Routes 59 and 20 and from nearby private residences." Starview contends that Napora's affidavit contains "highly prejudicial" material not relevant to this appeal and was based on observations made before the present corporate owner came into possession of the theater. Starview, however, did not object to the exhibit when it was submitted to the trial court, did not move to strike it or offer counter-affidavits. Starview's present motion to strike the affidavit is untimely and is denied.

As an alternative to its motion to strike Appendix A and Appendix B, Starview has moved to file a copy of Investigator Napora's testimony given in September 1980 before the Cook County Board of Commissioners, which was four months after the trial court upheld the ordinance on May 2 1980. In his testimony before the County Board, Napora stated that as of June 16, 1980, the screen of the Starview theater could be seen from only one location outside the theater. From that location Napora was able to discern that there was a picture on the screen. Napora observed colors and movement but he could not make out a specifict shape or form.

We cannot take judicial notice of Napora's testimony before the County Board unless Starview was offering it to prove that the issues in this appeal have become moot subsequent to the trial court's judgment because no scenes of sexually explicit nudity are now viewable from outside the theater. (See *Bluthardt* v. *Breslin* (1979), 74 Ill. 2d 246, 250, 384 N.E.2d 1309.)[4] Starview, however, has not asked that this appeal be dismissed on grounds of mootness. In the absence of an allegation of mootness, judicial notice cannot be extended to permit the introduction of

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[4] A reviewing court can take judicial notice of such events or facts which, while not appearing in the record, disclose that an actual controversy no longer exists between the adverse parties. (*Bluthardt* at 250.) Where the facts suggesting mootness are neither matters of common knowledge nor readily verifiable and capable of "instant and unquestionable demonstration" (9 Wigmore, Evidence, sec. 2571, at 548 (3d ed. 1940)), they may be proved by extrinsic evidence, including a motion supported by affidavit. *Slaughter* v. *Thornton* (1st Dist. 1975), 34 Ill. App. 3d 422, 424, 339 N.E.2d 776; *Buckingham Corp.* v. *Vesolowski* (1st Dist. 1974), 17 Ill. App. 3d 58, 61, 307 N.E.2d 703; *La Salle National Bank* v. *City of Chicago* (1954), 3 Ill. 2d 375, 379, 121 N.E.2d 475.

new factual evidence not presented to the trial court. (*Ashland Savings & Loan Association* v. *Aetna Insurance Co.* (1st Dist. 1974), 18 Ill. App. 3d 70, 78, 309 N.E.2d 293.) We therefore deny Starview's motion to file a copy of Investigator Napora's testimony.

We now reach the merits of this cause. Starview maintains that section 14-53. (3) of the Cook County Outdoor Movie Theater Ordinance is unconstitutional because it imposes an impermissible prior restraint on materials protected by the first amendment and because it discriminates on the basis of a film's content in violation of the equal protection clause of the fourteenth amendment. Motion pictures, of course, constitute a form of expression entitled to protection under both the first and the fourteenth amendments to the United States Constitution. *Jenkins* v. *Georgia* (1974), 418 U.S. 153; *Joseph Burstyn, Inc.,* v. *Wilson* (1952), 343 U.S. 495, 502

Under the Cook County Outdoor Movie Theater Ordinance, films that depict scenes of "sexually explicit nudity" may not be exhibited if the films are "viewable from any private residence or any public street or walkway." The County does not dispute that the definition in the ordinance of "sexually explicit nudity" satisfies neither the minimum federal constitutional standards for obscenity enunciated in *Miller* v. *California* (1973), 413 U.S. 15, nor the more stringent requirements imposed by section 11-20 of the Illinois Criminal Code (Ill. Rev. Stat. 1979, ch. 38, par. 11-20) as that section has been interpreted by our supreme court. (See *People* v. *Ridens* (1974), 59 Ill. 2d 362, 372-73, 321 N.E.2d 264, where the supreme court retained the stricter "redeeming social value" obscenity criterion announced in *Memoirs* v. *Massachusetts*

(1966), 383 U.S. 413.)[5] It is apparent, therefore, that if the ordinance had attempted to ban the exhibition of all movies that contain scenes of "sexually explicit nudity," it would not pass constitutional muster. The ordinance, however, does not reach that far.

Films containing the scenes defined in the ordinance are prohibited only if they are "viewable from any private residence or any public street or walkway." Thus, the initial constitutional question raised by this ordinance is whether the County may use a film's contents as the basis for imposing regulations that fall short of complete suppression. Relying principally on *Police Department of Chicago* v. *Mosley* (1972), 408 U.S. 92, Starview asserts that such content based discrimination is never permissible.

In *Mosley,* the Supreme Court struck down a Chicago city ordinance that prohibited all peaceful picketing in the vicinity of a school except peaceful labor picketing. "The central problem with Chicago's ordinance," according to the Court, "is that it describes permissible picketing in terms of its subject matter." (408 U.S. at 95.)

> "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations.] To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free

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[5] The *Ridens* tests for determining obscenity under section 11-20 have been held applicable to prosecutions under local obscenity ordinances. See *Eagle Books, Inc.* v. *City of Rockford* (2d Dist. 1978), 66 Ill. App. 3d 1038, 1043, 384 N.E.2d 493; *City of Delevan* v. *Thomas* (3d Dist. 1975), 31 Ill. App. 3d 630, 632-33, 334 N.E.2d 190.

from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co.* v. *Sullivan,* [376 U.S. 254] at 270.

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' [footnote omitted] and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based by reference to content alone." 408 U.S. at 95-96.[6]

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[6] Again, at p. 99 of the Mosley opinion, the Court stated: "In this case, the ordinance itself describes impermissible picketing not in terms of time, place and manner, but in terms of subject matter. The regulation 'thus slip[s] from the neutrality of time, place and circumstances into a concern about content.' [Footnote omitted.] This is never permitted." Similar expressions appear in the Court's decisions in *Carey* v. *Brown* (1980), 447 U.S. 455, 460-63; *Linmark Associates, Inc.* v. *Township of Willingboro* (1977), 431 U.S. 85, 94; *Madison School District* v. *Wisconsin Employment Relations Com.* (1976) 429 U.S. 167, 175-76; and *Hudgens* v. *National Labor Relations Board* (1976), 424 U.S. 507, 520, all cited by Starview. Starview does not maintain that the private residences of nearby homeowners constitute a "public forum," nor does it assert a right to exhibit its films so that they may

In *Young* v. *American Mini Theatres, Inc.* (1976), 427 U.S 50, however, Mr. Justice Stevens, writing for a plurality of the Court, observed:

> "This statement [from *Mosley*] and others to the same effect, read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication. But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached. When we review this Court's actual adjudications in the First Amendment area, we find this to have been the case with the stated principle that there may be no restriction whatever on expressive activity because of its content." 427 U.S. at 65-66.

Justice Stevens then surveyed those Supreme Court decisions which have held that neither the first amend-

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[e] (Continued)

be viewed from outside the theater. Starview, after all, is "a commercial enterprise which depends for its success on *paying* customers, not on freeloading passersby." (*Erznoznik* v. *City of Jacksonville* (1975), 422 U.S. 205, 210, n.6.) Thus, unlike the circumstances present in *Mosley* and the related cases cited by Starview, there is no "public forum" issue here. *Mosley,* however, does address the constitutionality of content-based discrimination. The discrimination of which Starview complains inheres in the fact that under the ordinance only outdoor theaters intending to present films containing scenes of "sexually explicit nudity" must incur the costs of shielding their screens from the view of persons outside the theater.

ment nor the equal protection clause prevents the State from prohibiting incitements to crime or violence, "fighting comments," publication of sensitive military data in time of war, libel, or obscenity. Starview does not quarrel with these decisions but contends that since films depicting scenes of sexually explicit nudity do not fall within any of the classifications of speech that may be prohibited entirely (*e.g.*, obscenity), such films may not be regulated either.[7] *Young* rejected this conclusion.

At issue in *Young* was the constitutionality of two Detroit zoning ordinances that dispersed the location of "adult" motion picture theaters. The classification of a theater as "adult" was expressly predicated on the character of the motion pictures which the theater exhibited. If the theater was used to present "material distinguished or characterized by an emphasis on matter depicting or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' " it was an adult establishment. (427 U.S. at 53.) The definitions of these terms encompassed more than that which could be banned as obscene under *Miller* v. *California* (1973), 413 U.S. 15. Nevertheless, "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value," "the State may legitimately use the contents of these materials as the basis

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[7] See, *e.g.*, Justice Brennan's concurring opinion in *Lamont* v. *Postmaster General* (1965), 381 U.S. 301, 309: "• • • [I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. [Citations.]" See also *Boyd* v. *United States* (1886), 116 U.S. 616, 635.

for placing them in a different classification from other motion pictures." 427 U.S. at 70-71.[8]

We hold that the Cook County Outdoor Movie Theater Ordinance is not unconstitutional solely because the regulations are based on the content of communication protected from total suppression by the first amendment.[9]

In *Young*, the Supreme Court found that the line drawn by the ordinances imposed only a minimal burden on protected speech and was justified by Detroit's interest in preserving the character of its neighborhoods. The potential burdens to protected speech are more substantial here than in *Young* because an outdoor theater owner desiring to present films containing sexually explicit nudity may have to expend substantial sums of money to comply with the restrictions of the ordinance.

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[8] While only three other Justices joined this portion of Justice Stevens' opinion. a majority of the Court has recently acknowledged that *Young* stands for the proposition "that a zoning ordinance is not invalid merely because it regulates activity protected by the Fourth Amendment, * * *." *Schad* v. *Borough of Mount Ephraim* (1981), ... U.S. ....., 101 S.Ct. 2176, 2184.

[9] In concluding that content based regulation of non-obscene material is not *per se* unconstitutional, we do not rely on the Supreme Court's decision in *FCC* v. *Pacifica Foundation* (1978), 438 U.S. 726, cited by the County. That case involved the Federal Communication Commission's regulatory power over broadcasting. The Court specifically noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." (438 U.S. at 748.) For purposes of constitutional analysis, an outdoor movie theater is not engaged in "broadcasting." The County's reading of the *FCC* case is clearly at odds with what the Supreme Court has held to be permissible in regulating the fare of outdoor theaters. See *Erznoznik* v. *City of Jacksonville* (1975), 422 U.S. 205, discussed below.

(See, *e.g., Olympic Drive-In, Inc.* v. *City of Pagedale* (Mo. 1969), 441 S.W.2d 5, 8). The theater's only alternative to incurring these additional costs is to avoid showing these movies. The ordinance thus has the effect of deterring outdoor theaters from exhibiting films containing scenes of sexually explicit nudity. "Such a deterrent, although it might not result in total suppression of these movies, is a restraint on free expression." (*Erznoznik* v. *City of Jacksonville* (1975), 422 U.S 205, 211, n.8.) Thus, we consider whether such a restraint is constitutional.

Both Starview and the State's Attorney have characterized the Cook County Outdoor Movie Theater Ordinance as a system of *prior* restraints. If this characterization is accurate, then the ordinance is presumptively invalid. (*Bantam Books* v. *Sullivan* (1963), 373 U.S. 58, 70.) Neither party, however, defines "prior restraint" or attempts to explain why prior restraint principles should be applied to this ordinance.

A "prior restraint" has been succinctly defined as "any restraint of future expression because of the content of either past or anticipated future expression * * *." (*Cornflower Entertainment, Inc.* v. *Salt Lake City Corp.* (D. Utah 1980), 485 F. Supp. 777, 780.) According to this definition, the Cook County Outdoor Movie Theater Ordinance may be described as a "prior restraint." In applying for a license, an outdoor theater owner must agree to comply with certain specific conditions imposed by the ordinance relating to the exhibition of films containing scenes of "sexually explicit nudity." His license may be revoked for violation of those conditions. But regardless of whether section 14-53.(3) of the ordinance falls within this or any other abstract definition of "prior restraints,"[10] it is apparent that section 14-53.(3) shares

[10] We are mindful of Mr. Justice Frankfurter's admonition that the term "prior restraint" is neither "a self-wielding sword" nor a "talismanic test." *Kingsley Books, Inc v. Brown* (1957), 354 U.S. 436, 441.

none of the vices commonly associated with prior restraints previously held invalid by the United States Supreme Court.

The ordinance does not establish a scheme of discretionary administrative censorship under which films must be submitted to a censor before they may be exhibited. Thus, the many Supreme Court cases which have struck down such censorship systems because of their overbroad delegation, potential for abuse, and lack of adequate procedural safeguards for review of the censor's decision are inapplicable. See, *e.g.*, *Freedman* v. *Maryland* (1965), 380 U.S. 51, and *Joseph Burstyn, Inc.* v. *Wilson* (1952), 343 U.S. 495 (movies); *Bantam Books, Inc.* v. *Sullivan* (1963), 372 U.S. 58 (books); *Blount* v. *Rizzi* (1971), 400 U.S. 410 (mail); *Southeastern Promotions, Ltd.* v. *Conrad* (1975), 420 U.S. 546 (plays).

Nor does the ordinance authorize an injunction against the exhibition of any particular film, enforceable through a contempt proceeding. The principal vice of this form of prior restraint is that, in a contempt hearing, a person may lose the right to assert the defense that his communication was protected by the first amendment. (*Vance* v. *Universal Amusement Co., Inc.* (1980), 445 U.S. 308; *Walker* v. *City of Birmingham* (1967), 388 U.S. 307.) That possibility does not exist here. In any proceeding to revoke a license or to enjoin a theater from operating without one, the theater owner may raise the defense that the ordinance is void on its face because it is unconstitutionally overbroad or impermissibly vague or both. *Shuttlesworth* v. *City of Birmingham* (1969), 394 U.S. 147; *Staub* v. *City of Baxley* (1968), 355 U.S. 313; *Lovell* v. *Griffin* (1938), 303 U.S. 444.

We believe that the Cook County Outdoor Movie Theater Ordinance may be classified as a legislative prior restraint. This form of prior restraint, however, does not possess any of the objectionable features of executive or judicial prior restraints and should not be subject to the same scrutiny:

> "In the legislative form of prior restraint, somewhat different factors pertain. Here no individual discretion is involved. The control may operate to prevent expression, but most of the abuses arising out of intimate government inspection and supervision of communication are absent. Under such circumstances, the strict rule of prior restraint should not apply. Hence the validity under the First Amendment turns upon the same sort of considerations as in subsequent punishment cases, with the element of preventive control operating as an additional, but not conclusive, factor." T. Emerson, "The Doctrine of Prior Restraint," (1955), 20 Law & Contemp. Problems 648, 671.

We do not believe that the usual heavy presumption of invalidity with which prior restraints are burdened is entitled to much weight in reviewing this ordinance. Nevertheless, as in *Erznoznik*, the ordinance does constitute "a restraint on free expression." (422 U.S. 205, 211, n.8.) The State's Attorney contends that this restraint may be sustained as a reasonabe exercise of the County's police power to protect the right of privacy of nearby residents from whose homes the films are viewable, and to regulate expression where the well-being of its children is at stake.

With respect to the first interest, the Supreme Court has repeatedly held that "[a] State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. [Citations.]" (*Erznoznik* v. *City of Jacksonville* (1975), 422 U.S. 205, 209.)

> "But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. [Citations.] Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see *Rowan* v.

> *Post Office Dept.*, 397 U.S. 728 (1970), or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. [Citation.]" 422 U.S. 209.

In *Rowan* v. *Post Office Department* (1970), 397 U.S. 728, the Supreme Court upheld a federal statute that permits a person receiving a "pandering advertisement" which he believes to be "erotically arousing or sexually provocative" to instruct the Postmaster General to inform the sender that such mail is not to be sent in the future. "* * * [T]he mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from the mailer." (397 U.S. at 737.) Particularly appropos of the issue here are the Court's following remarks:

> "To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen or to view any unwanted communication, whatever its merit, * * *." 397 U.S. at 737.

In our judgment, the Supreme Court's opinion in *Rowan* clearly justifies that part of the County ordinance which forbids a licensee from projecting onto a vast screen[11] scenes portraying sexual intercourse and other sexually explicit nudity if such scenes are "viewable from any private residence." "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." 397 U.S. at 738.[12]

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[11] According to the record, Starview's screen is 72 feet high and 96 feet wide.

[12] Citing *Rowan*, the Supreme Court has expressly held that "in the privacy of the home, * * * the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *FCC* v. *Pacifica Foundation* (1978), 438 U.S. 726, 748.

Without the protection afforded by the ordinance, a homeowner who objects to what he regards as obnoxious and offensive scenes of sexually explicit nudity is powerless to prevent these scenes from being beamed into the privacy of his living room where they may disturb the tranquility of his home and interfere with the raising of his children. (See, in this regard, *Prince* v. *Massachusetts* (1944), 321 U.S. 158.) Criminal prosecution under the obscenity provisions of the Criminal Code may not be possible because the films, taken as a whole, may not be obscene.[13] Even as to films that are ultimately found to be obscene, criminal prosecution cannot undo the damage already done to the sensibilities of unwilling viewers. " * * * [E]xposure to [erotic materials] is for some persons an intense emotional experience. A communication of this nature, imposed upon a person contrary to his wishes, has all the characteristics of a physical assault * * * [and it] constitutes an invasion of his privacy * * *." T. Emerson, *The System of Freedom of Expression* (1970), at 496, quoted in *Paris Adult Theatre I* v. *Slaton* (1973), 413 U.S. 49, 106-07 (Brennan, J., dissenting)

Nor does the law of public nuisance offer an alternative remedy to residents whose privacy has been invaded. Although the regulations of the ordinance are not limited to the standards of obscenity set forth in *Miller* v. *California*, not even obscenity itself can be abated as a public nuisance under section 1 of "An Act regarding places used for purposes of lewdness, assignation, or prostitution * * *." (Ill. Rev. Stat. 1979, ch. 100½, par. 1; *People ex rel. Difanis* v. *Futia* (4th Dist. 1978), 56 Ill. App. 3d 920, 926-27, 373 N.E.2d 530; *People* v. *Goldman* (4th Dist. 1972), 7 Ill. App. 3d 253, 254-56, 287 N.E.2d 177; see also *People* v. *Movies, Inc.* (1971), 49

[13] Indeed, the State's Attorney has specifically argued that the purpose of the ordinance was to provide the citizens of Cook County with a "remedy against pornography which falls just short of obscenity."

Ill. 2d 85, 87, 273 N.E.2d 366 (*dicta*).) Moreover, it has been held that the presentation of obscene films at an outdoor theater may not be enjoined as a common law public nuisance where the alleged injury is not to the public generally but only to the right of privacy of a few nearby residents from whose homes the films are visible. *People ex rel. Carey* v. *Route 53 Driev-In* (1st Dist. 1976), 45 Ill. App. 3d 81, 83-84, 358 N.E.2d 1298.[14]

In our opinion, the Cook County Outdoor Movie Theater Ordinance represents a conscientious and constitutional effort by the County Board to protect the right of persons in their own homes to be free from the visual onslaught of offensive sexual materials.

That brings us to the portion of the ordinance which prohibits the exhibition of sexually explicit nudity "viewable from * * * any public street or walkway." The principal Supreme Court case in this area is *Erznoznik* v. *City of Jacksonville* (1975), 422 U.S. 205.

Erznoznik concerned the validity of a Jacksonville, Florida ordinance that banned drive-in theaters from showing films in which "the human male or female bare buttocks, human female breasts, or human bare pubic areas are shown" if such films were "visible from any public street or public place." (422 U.S. at 207.) The Court found that the city's interest in preventing significant intrusions on privacy did not justify the ordinance because "it seeks only to keep these films from being seen from public streets and places where the offended

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[14] In this appeal, we need not determine under what circumstances either live entertainment or films constitutionally may be enjoined as obscene. See *City of Chicago* v. *Festival Theatre Corp.* (1st Dist. 1980), 88 Ill. App. 3d 216, 230, 410 N.E.2d 341 (petition for leave to appeal allowed, January 30, 1981); *Vance* v. *Universal Amusement Co., Inc.* (1980), 445 U.S. 308.

viewer readily can avert his eyes." (422 U.S. at 212.)[15] The Court also rejected Jacksonville's alternative theory that the ordinance was a valid exercise of the city's police power to protect its children. While the Court agreed that under its prior rulings, *e.g., Ginsberg* v. *New York* (1968), 390 U.S. 629, a State or municipality can adopt more stringent controls on communicative materials available to youth than on those available to adults, it found that the ordinance in question was broader than permissible:

> "The ordinance is not directed against *sexually explicit nudity* [emphasis added], nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus, it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. See *Ginsberg* v. *New York, supra.* Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. at 213-14.

The Court noted that "[t]he only narrowing construction which occurs to us would be to limit the ordinance

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[15] In footnote 9 to its opinion, the Court said that it was not concerned with "a non-discriminatory nuisance ordinance designed to protect the privacy of persons in their homes from the visual and audible intrusions of such theaters." Here, of course, the ordinance does discriminate on the basis of a film's content. *Erznoznik* itself, however, recognized that under *Rowan*, selective restrictions of some kinds of speech may be upheld "when the speaker intrudes on the privacy of the home." 422 U.S. at 209.

to movies that are obscene as to minors" (422 U.S. at 216, n.15), but found that the Jacksonville ordinance was not susceptible of such a limiting construction and held the ordinance unconstitutional.

With respect to minors, what is obscene? *Erznoznik* made clear that "under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene 'such expression must be, in some significant way, erotic.' *Cohen* v. *California*, 403 U.S. 15, 20 (1971). See *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 106-107 (1973) (Brennan, J. dissenting)." 422 U.S. at 213, n.10.

We experience no difficulty in holding that scenes depicting sexual intercourse, masturbation or oral copulation (sec. 14-53. (3), clause (A)) or erect male genitalia or male ejaculation (clause (C)) are erotic. Such scenes constitute the type of "sexually explicit nudity" which *Erznoznik* suggested could be prohibited (as to minors) by a properly drawn ordinance.[16] And we reject Starview's interpretation of *Erznoznik* that scenes of "sexually explicit nudity" cannot be prohibited without regard for their context or pervasiveness. As we interpret the Court's opinion, sexually explicit nudity is inherently erotic and may be proscribed. Nudity alone is not necessarily erotic and cannot be banned, even as to minors, without considering the context in which the nudity appears

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[16] In its brief, the County implies that section 14-53. (3) is constitutional because it uses the same term "sexually explicit nudity" which *Erznoznik* approves. However, it is the definition in the ordinance of the term "sexually explicit nudity" and not its mere incantation which determines the constitutionality of section 14-53.(3). We recognize "the ancient wisdom that calling a thing by a name does not make it so." *Madison School District* v. *Wisconsin Employment Relations Com.* (1976), 429 U.S. 167, 174.

and its pervasiveness throughout a movie. We do not believe, however, that every scene described in clause (B) or the ordinance ("[t]ouching, caressing, or fondling of the bare female breast or bare male or female buttocks, anus, or genitals") is necessarily erotic.

Clause (B) would prohibit scenes of a mother breast-feeding or bathing her baby, or of a parent lovingly caressing an infant. It would also prohibit the presentation of films in which breast self-examination techniques are demonstrated. Many other examples of non-erotic scenes falling within the scope of clause (B) suggest themselves. We find that clause (B) is overbroad. Moreover, we do not believe a narrowing construction of this clause is possible without either rewriting the ordinance or substituting an impermissibly vague standard (*e.g.*, any "lewd" touching, caressing or fondling) for one which is clear and specific but overbroad. We hold, therefore, that clause (B) is unconstitutional to the extent it restricts the exhibition of films that are viewable only from "any public street or walkway." This holding, however, does not affect the validity of any other provision of the ordinance. Nor does this holding prevent clause (B) of section 14-53. (3) from being enforced against an outdoor theater that exhibits films viewable from "any private residence."

For the foregoing reasons, we hold that clauses (A) and (C) of section 14-53. (3) of the Cook County Outdoor Movie Ordinance, as amended, are constitutional. We hold further that clause (B) of section 14-53. (3) is constitutional in part and unconstitutional in part. Accordingly, the trial court is affirmed in part and reversed in part.

Affirmed in part; reversed in part.

HARTMAN, P.J., and DOWNING, J., concur.

"APPENDIX D"

CCG-2 ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY (COUNTY) (MUNICIPAL) DEPARTMENT CHANCERY (DIVISION) (DISTRICT)

People ex rel Carey

v.

Strawman Drive Inn, et al

NO. 79CH6931

ORDER

This matter coming on to be heard on defendants Motion to dismiss and plaintiffs Complaint for declaratory relief, the parties being present and the court fully advised in the full hearing and oral argument,

IT IS ~~ORDERED~~ FOUND that the ordinance in question is a ~~void~~ Constitutional effort to license the defendant and other theatres. The court distinguishes the cases cited by defendant as ~~that~~ The ordinance does not impose criminal sanctions but only regulates by way of license.

IT IS therefore Ordered that the defendants Motion To Dismiss is denied and plaintiffs ~~as~~ prayer for a finding of constitutionality of the ordinance is granted.

IT IS FURTHER ORDERED that this matter is final and appealable.

Name Bernard Carey by J. Diemer

Attorney for plaintiff

Address 500 Daley Center

City Chicago

Telephone 443-7340

ENTERED
CLERK OF THE CIRCUIT COURT
MORGAN M. FINLEY
MAY 29 1980
ENTER: JUDGE HAROLD SIE...
DEPUTY CLERK

, 19

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

"APPENDIX E"

OUTDOOR MOVIE THEATER ORDINANCE

(CH. 14-47 ET SEQ.)

Be it enacted by the People of the County of Cook, represented by the Cook County Board of Commissioners:

14-47. That no citizen, firm or corporation of this State shall operate a public outdoor movie theater used for public viewing of motion pictures or other film presentations in the County of Cook, and outside the limits of any city, town, or village, without first having obtained an outdoor movie theater license for each location.

14-48. That applications for outdoor movie theater licenses shall be made on forms provided by the President of the Board of Commissioners of Cook County, and shall be made to the Board of Commissioners of Cook County, and at the time application is made the applicant shall pay the sum of one hundred dollars for the whole or any portion of the license period hereby established.

14-49. That every license issued by the Board of Commissioners of Cook County shall be valid for a period of one year from the first day of May to the thirtieth day of April following, unless sooner revoked under the provisions of this Ordinance, and shall be subject to all laws, resolutions and regulations now in force and effect, or which may be hereafter enacted, adopted or approved, relating to outdoor movie theaters used for public viewing of motion pictures, or other film presentations.

14-50. That a license for every location, place or premise licensed under the terms and by virtue of the above provisions, shall be framed and hung in plain view in a conspicuous place upon the premise so licensed.

14-51. That application for outdoor movie theater licenses shall contain, under oath of the applicant, the name, address and residence of the applicant and owner and the length of time that they have resided at that residence, and the location of the place or building where the applicant intends to operate or maintain the outdoor movie theater.

14-52. That the terms "person or persons" used in this resolution, shall include and mean individuals, firms, partnerships or corporations and that the term "Cook County" as used in this resolution shall include and mean all that territory within the geographical limits of the County of Cook, State of Illinois, which is not within the corporate limits of any city, town or village.

14-53. That every applicant for a license shall covenant and agree:

(1) To keep the premises free at all times from the presence of disorderly persons, and to prevent any immoral practices thereon;

(2) To prevent the violation upon the premises licensed of any law or ordinance, Federal, State or County;

(3) To desist from exhibiting any motion picture or film presentation viewable from any private residence or any public street or walkway which contains any scene or scenes depicting any of the following sexually explicit nudity:

(A) Sexual intercourse, masturbation or oral copulation; or

(B) Touching, caressing or fondling of the bare female breast or bare male or female buttocks, anus, or genitals; or

(C) Erect male genitalia or male ejaculation.

(4) To refuse admittance of all minors un-accompanied by their parents or guardians to motion pictures or film presentations as described in Paragraph (3) above.

14-54. LICENSE REVOCATION

Any misstatements made on the application or any violation of the terms and conditions of the application shall constitute cause for revocation of the license applied for or received. In lieu of license revocation, the hearing officer may assess a fine not to exceed $2,500 for the first two violations.

When any allegations of Ordinance violation become known to the President of the Board of Commissioners or his designee he shall send by certified mail, return receipt requested, a notice of hearing to the named owner at the address given on the application form. The notice shall contain a brief statement of the alleged violations and the date and place for hearing. The hearing officer will be the President of the Board of Commissioners or his designee.

Evidence will be limited to the factual issue(s) raised by the notice. Persons with relevant information will testify under oath before a certified reporter. The hearing officer may refuse to hear cumulative evidence and he will moderate the hearing. Strict rules of evidence will not apply to the proceedings but the hearing officer will strive to elicit the facts fully and in credible form.

At the conclusion of the testimony the hearing officer will make a finding of whether or not the Ordinance has been violated based upon the greater weight of the evidence. License revocation or a fine shall be ordered upon a finding of an Ordinance violation. The hearing officer will mail a written copy of the finding to the licensee by certified mail, return receipt requested.

A licensee who has been found to have violated the Ordinance may appeal such finding to a review board consisting of three members nominated by the President of the Board of Commissioners with the advice and consent of the Board of Commissioners. A notice of appeal must be filed with the Secretary of the Board of Commissioners within fourteen (14) days from the date the finding was mailed to the licensee. Enforcement of the finding will be stayed pending review by the review board. Within ten (10) days of the filing of the notice of appeal the licensee may file with the Secretary of the Board of Commissioners written exceptions to the hearing officer's findings. No oral presentation will be made to the Review Board.

The review board will review the written record, tangible evidence, the hearing officer's findings and the licensee's exceptions. The review board will expeditiously vote to recommend affirmance, reversal, or modification of the finding of the hearing

officer and/or his order of revocation or fine to the Board of Commissioners. The decision of the Board of Commissioners will be mailed to the licensee by certified mail, return receipt requested.

14-55. SEVERABILITY CLAUSE

If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are severable.

14-56. These amendments shall become in full force and effect upon passage.

(Enacted July 10, 1978, amended August 6, 1979.)

"APPENDIX F"

IN THE APPELLATE COURT
OF ILLINOIS, FIRST DISTRICT

STARVIEW DRIVE IN THEATRE, INC.,

Appellant

vs.

PEOPLE OF COOK COUNTY, ILLINOIS, GEORGE W. DUNNE, President Board of Commissioners of Cook County, Ill., and Board of Commissioners of Cook County, Illinois; ex rel. BERNARD CAREY, State's Attorney of Cook, County, Illinois,

Appellees

No. 80-1538

1982 FEB 26 AM 9 30
CLERK OF THE APPELLATE COURT

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that STARVIEW DRIVE IN THEATRE, INC., the appellant above-named, hereby appeals to the Supreme Court of the United States from the Judgement of the Illinois Appellate Court of the First District, finding certain sections of the COOK COUNTY OUTDOOR MOVIE THEATRE ORDINANCE constitutional. The Opinion of the Illinois Appellate Court was rendered on September 8, 1981, Petition for rehearing denied on September 28, 1981, and Petiton for Appeal to the Illinois Supreme Court was denied on February 2, 1982.

This appeal is taken pursuant to 28 U.S.C. sec. 1257(2).

L. ROBERT ARTOE
Counsel for Appellant

L. ROBERT ARTOE
Suite 714, Unity Building
127 North Dearborn Street
Chicago, Illinois 60602
312-782-9119

IN THE APPELLATE COURT
OF ILLINOIS, FIRST DISTRICT

STARVIEW DRIVE IN THEATRE, INC., Appellant vs. PEOPLE OF COOK COUNTY, ILLINOIS, GEORGE W. DUNNE, et al, ex rel. BERNARD CAREY, State's Attorney, Appellee	No. 80-1538

TO: Mr. John A. Dienner, III, Esq.
Ass't State's Attorney
Room 500, Daley Civic Center
Chicago, Illinois 60602

NOTICE OF FILING

PLEASE TAKE NOTICE THAT on the 26th day of February, 1982, I have caused to be filed with the Clerk of the Appellate Court of Illinois for the First District an Original and four copies of the attached NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES in the above cause. A copy of that NOTICE is hereby served upon you.

L. ROBERT ARTOE
for: Starview Drive In Theatre, I

PROOF OF SERVICE

L. ROBERT ARTOE, a licensed attorney at law, states that on the twentysixth day of February, 1982, he served this NOTICE OF FILING and PROOF OF SERVICE upon the above named person and office by delivering a copy of same to the office of the above named and leaving it with a person in charge, alomg with a copy of the NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

L. ROBERT ARTOE

L. ROBERT ARTOE
Suite 714, Unity Building
127 North Dearborn Street
Chicago, Illinois 60602
782-9119

Motion to Dismiss or Affirm

No. 81-1953

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1981

STARVIEW DRIVE IN THEATRE, INC.,

Appellant,

vs.

PEOPLE OF COOK COUNTY, ILLINOIS, GEORGE W. DUNNE, President of the Board of Commissioners of Cook County, Illinois, and BOARD OF COMMISSIONERS OF COOK COUNTY, ILLINOIS ex rel. BERNARD CAREY, State's Attorney of Cook County, Illinois,

Appellees.

On Appeal From The First District Appellate Court of Illinois

MOTION OF APPELLEES TO DISMISS OR AFFIRM

RICHARD M. DALEY
State's Attorney of Cook County, Illinois
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5740

May 21, 1982.

JANE CLARK CASEY
Deputy State's Attorney
Chief, Civil Actions Bureau

HENRY A. HAUSER
NANCY K. DONNELLAN
Assistant State's Attorneys
Of Counsel.

In the
Supreme Court of the United States
October Term, 1981

STARVIEW DRIVE IN THEATRE, INC.,

Appellant,

vs.

PEOPLE OF COOK COUNTY, ILLINOIS, GEORGE W. DUNNE, President of the Board of Commissioners of Cook County, Illinois, and BOARD OF COMMISSIONERS OF COOK COUNTY, ILLINOIS ex rel. BERNARD CAREY, State's Attorney of Cook County, Illinois,

Appellees.

On Appeal From The First District Appellate Court of Illinois

MOTION OF APPELLEES TO DISMISS OR AFFIRM

The appellees respectfully move the Court to dismiss the appeal, or to affirm the judgment of the First District Appellate Court of Illinois. Rule 16(1)(b)(c).

QUESTION PRESENTED

Whether the Cook County Outdoor Movie Theater Ordinance is a valid exercise of Cook County's Police Power.

MOTION TO DISMISS

The appellees hereby move to dismiss this appeal on the ground that the judgment rests on an adequate non-federal basis. Under the Constitution of Illinois, Cook County, as a Home Rule Unit, has the power to regulate for the protection of the public health, safety, morals and welfare. Ill. Const. art. 4 §6(a).

Although appellant raises constitutional issues such as equal protection, prior restraint, and free expression, the real issue is strikingly simple. Can Cook County restrict the Appellant from showing scenes of fornication, oral copulation, masturbation and the like from unwilling viewers in their homes? The County either has the police power to do so or it does not. The people either have the right to be free from this visual intrusion or they do not. It is clear that the Constitution of Illinois so provides.

MOTION TO AFFIRM

Alternatively, the appellees move to affirm the judgment of the Illinois Appellate Court holding the Cook County Outdoor Movie Ordinance constitutional insofar as it prohibits scenes of sexually explicit nudity from being exhibited if viewable from private residences.

The court below gave careful consideration to the appellant's contentions that the Ordinance imposed an unconstitutional prior restraint on materials protected by the First Amendment, and discriminated on the basis of the film's content in violation of the equal protection clause of the Fourteenth Amendment. The Ordinance does not ban exhibition of all movies which contain scenes of sexually explicit nudity but only those that are viewable from

private residences. The court cited *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) as authority for finding that the Cook County Outdoor Movie Theater Ordinance is constitutional even though the regulation is based on the content of communication protected from total suppression by the First Amendment.

Moreover, the Ordinance carries none of the vices commonly associated with prior restraints held invalid by this Court. The Ordinance does not establish a scheme of discretionary administrative censorship under which films may be exhibited, nor does the Ordinance authorize an injunction against the exhibition of any particular film, enforceable through a contempt proceeding.

Rowan v. *Post Office Department*, 397 U.S. 728 (1970) was cited as clear justification for that part of the County Ordinance which forbids a licensee from projecting onto a vast screen scenes portraying sexual intercourse and other sexually explicit nudity if such scenes are viewable from any private residence. Without the protection of the Ordinance, a homeowner who objects to what he regards as obnoxious and offensive scenes of sexually explicit nudity is powerless to prevent these scenes from being beamed into the privacy of his living room where they may disturb the tranquility of his home and interfere with the raising of his children. The court found the Cook County Outdoor Movie Theater Ordinance a conscientious and constitutional effort by the County Board to protect the rights of persons in their own home to be free from the visual onslaught of offensive sexual materials.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or the decision of the Illinois Appellate Court affirmed.

Respectfully submitted,

RICHARD M. DALEY
State's Attorney of Cook County, Illinois
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5740

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JANE CLARK CASEY
Deputy State's Attorney
Chief, Civil Actions Bureau

HENRY A. HAUSER
NANCY K. DONNELLAN
Assistant State's Attorneys
Of Counsel.